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**Education and Local Government Interim Committee**  
**63rd Montana Legislature**

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To: ELG Committee Members  
From: Laura Sankey, staff attorney *LUS*  
Date: September 4, 2014  
Re: HJR 2 Bill Draft -- Issues Identified and Alternatives Proposed

The original version of the HJR 2 public records bill draft, LCOptC, was presented to ELG on June 17, 2014. An updated and revised version of the bill draft was sent electronically to members of ELG on August 14. The revised bill draft was also published through the electronic notification system and posted to ELG's website on the same day. ELG committee staff received comments from members of the public and stakeholders who had not yet participated in the bill drafting process. The attached letter from the Montana Newspaper Association provides some information about the issues that organization has identified in the bill draft.

ELG members raised additional questions and concerns about the original version of the bill draft at the June 17 meeting. ELG staff worked with members of the statutory subgroup to develop alternative bill draft language that addresses the identified concerns. The following memo includes a brief explanation of some of the issues identified and provides some drafting alternatives that the committee may wish to consider at its final interim meeting in September.

**I. Addition of an Enforcement/Remedy Provision**

The current version of the bill draft does not contain a section that addresses how a person would challenge an agency's decision to not release information that the person believes should be released. The following section was drafted as a potential new section that includes both the process for filing a complaint and also contains a provision, based on a similar section in the Open Meetings part (§ 2-3-221) allowing a prevailing plaintiff to recover fees.

**NEW SECTION. Section 7.5 [between section 7 and 8]. Written notice of denial -- civil action -- costs to plaintiff in certain actions to enforce constitutional rights.** (1) A public agency that denies an information request to release information or records must provide a written explanation for the denial.

(2) If a person who makes an information request receives a denial from a public agency and believes that the denial violates the provisions of this chapter, the person may file a complaint pursuant to the Montana Rules of Civil Procedure in district court.

(3) A plaintiff who prevails in an action brought in district court to enforce the plaintiff's rights under Article II, section 9 of the Montana constitution may be awarded costs and reasonable attorney fees.

## II. MHS Exemption in Section 3

The lobby for Montana's newspaper industry has expressed concern that the exemption found in section 3(3) for Montana Historical Society collections is overbroad and may be unconstitutional. The exemption is designed to address collections of private documents and artifacts that do not contain any public records and which are restricted from public access by the donors. The following section is an alternative version of the section 3(3) exemption and is meant to clarify that the records which are exempted are not public records.

### **NEW SECTION. Section 3. Access to public information -- privacy and security exceptions.**

(1) Every person has a right to examine and obtain a copy of any public information of this state, except for information that is constitutionally protected from disclosure because an individual privacy interest clearly exceeds the merits of public disclosure or as otherwise expressly prohibited by statute.

(2) A public officer may withhold from public scrutiny information relating to individual privacy or individual or public safety or security of public facilities, including public schools, jails, correctional facilities, private correctional facilities, and prisons, if release of the information may jeopardize the safety of facility personnel, the public, students in a public school, or inmates of a facility. Security features that may be protected under this section include but are not limited to architectural floor plans, blueprints, designs, drawings, building materials, alarms system plans, surveillance techniques, and facility staffing plans, including staff numbers and locations. A public officer may not withhold from public scrutiny any more information than is required to protect an individual privacy interest or safety or security interest.

(3) The provisions of this section do not apply to collections of the Montana historical society when restrictions on access have been imposed by collection creators or donors and the collections do not contain public information.

## III. Distribution Lists and Public Meeting Sign-in Sheets

Another concern raised by the newspaper association has to do with whether sign-in sheets created at public meetings are prohibited from being released as "distribution lists" under section 10. Under current practice, these sign-in sheets, which may contain contact information of meeting attendants, are sometimes used to keep these attendants updated as developments occur. New subsection (3) is an option for the committee's consideration that would require notification that providing that contact information grants the agency permission to distribute or sell the list.

**NEW SECTION. Section 10. Prohibition on dissemination or use of distribution lists --**

**exceptions -- penalties.** (1) Except as provided in subsections ~~(3) through (9)~~ (4) through (10), to protect the privacy of those who deal with state and local government:

- (a) a public agency may not distribute or sell a distribution list without first securing the permission of those on the list; and
- (b) a list of persons prepared by the public agency may not be used as a distribution list except by the public agency or another public agency without first securing the permission of those on the list.

(2) As used in this section, "distribution list" means any list of personal contact information collected by a public agency and used to distribute unsolicited information to the individuals on the list.

(3) A public agency that collects personal contact information from individuals who register their attendance at a public meeting by filling out a sign in sheet must clearly notify each person who uses the sign in sheet that providing personal contact information on the sign in sheet grants the agency permission under subsection (1) to use the information as a distribution list.

~~(3)~~ (4) This section does not prevent an individual from compiling a distribution list by examination of records that are otherwise open to public inspection.

~~(4)~~ (5) This section does not apply to the lists of:

- (a) registered electors and the new voter lists provided for in 13-2-115;
- (b) the names of employees governed by Title 39, chapter 31;
- (c) persons holding driver's licenses or Montana identification cards provided for under 61-5-127;
- (d) persons holding professional or occupational licenses governed by Title 23, chapter 3; Title 37, chapters 1 through 4, 6 through 20, 22 through 29, 31, 34 through 36, 40, 47, 48, 50, 51, 53, 54, 60, 65 through 69, 72, and 73; and Title 50, chapters 39, 72, 74, and 76; or
- (e) persons certified as claims examiners under 39-71-320.

~~(5)~~ (6) This section does not prevent an agency from providing a list to persons providing prelicensing or continuing education courses subject to state law or subject to Title 33, chapter 17.

~~(6)~~ (7) This section does not apply to the right of access by Montana law enforcement agencies.

~~(7)~~ (8) This section does not apply to a corporate information list developed by the secretary of state containing the name, address, registered agent, officers, and directors of business, nonprofit, religious, professional, and close corporations authorized to do business in this state.

~~(8)~~ (9) This section does not apply to the use by the public employees' retirement board of a mailing list of board-administered retirement system participants to send materials on behalf of a retiree organization formed for board-administered retirement system participants and with tax-exempt status under section 501(c)(4) of the Internal Revenue Code, as amended, for a fee

determined by rules of the board, provided that the mailing list is not released to the organization.

~~(9)~~ (10) This section does not apply to a public school providing lists of graduating students to representatives of the armed forces of the United States or to the national guard for the purposes of recruitment.

~~(10)~~ (11) A person violating the provisions of subsection (1)(b) is guilty of a misdemeanor.

#### IV. Department of Administration's Confidentiality Provision

One of the sections that is contained in the bill draft, section 49, was pulled into the bill draft so that a cross-reference to the existing public records laws could be updated. This particular provision relates to Business and Industrial Development Corporations (BIDCOs), which are overseen by the Department of Administration's Banking and Financial Institutions Division. The Division is concerned that the proposed amendment in the bill draft may change the meaning of this section and they recommend that the committee adopts this alternative language instead:

##### **Section 49. Section 32-11-107, MCA, is amended to read:**

**"32-11-107. Confidentiality.** (1) The director and other employees of the department may not disclose information acquired by them in the discharge of their duties under this chapter except to the extent that disclosure of the information is required by law, other than the public records provisions of ~~Title 2, chapter 6, [section 3]~~, or is required by court order.

(2) Notwithstanding subsection (1), the department may disclose information that is confidential under subsection (1) if the department determines that disclosure of the information is necessary to promote the public interest. This subsection does not authorize the disclosure of information acquired by the department in the course of an examination of a licensee.

(3) A BIDCO may provide to a current or prospective creditor or shareholder of the BIDCO a copy of an examination report on the BIDCO made by the department under this chapter."

#### V. Use of Person vs. Citizen Throughout Part 1

As was discussed at the initial presentation of the bill draft at the June ELG meeting, the committee has a policy choice to make regarding the use of the word "person" versus the word "citizen" throughout the bill draft. Currently, the bill draft uses the word "person." The workgroup chose to use the word "person" throughout part 1 of the bill draft (sections 1 through 11) for consistency and to reflect the use of the word "person" in Article II, section 9 (Right to Know), while Article II, section 8 (Right of Participation) uses the phrase "citizen participation."

Section 1-1-402, MCA, defines a citizen generally as either a person who was born in this state and is living here, or a person born elsewhere who is a citizen of the United States and is living here. Further, a variety of other sections throughout the MCAs refer to both citizens of the United States and citizens of Montana or of this state. For example, under Article IV, section 2 of the Montana Constitution, the requirements to be a qualified elector include being a citizen of the United States and meeting certain residence requirements.

In Montana's current public records laws, some sections use "person" while some use "citizen." A recent U.S. Supreme Court case looked at the use of "citizen" in a public records statute in Virginia. In McBurney v. Young, 133 S. Ct. 1709 (2013), the statute at issue stated, "all public records shall be open to inspection and copying by any citizens of the Commonwealth[.]" Under this statute, the Court found that it was permissible for a Virginia state agency to deny information requests made by out-of-state citizens under Virginia's Freedom of Information Act (FOIA) and the denial did not violate the Privileges and Immunities Clause of the U.S. Constitution. Additionally, other Virginia statutes specifically allowed the plaintiffs access to most of the records they had requested under the Virginia FOIA. However, Virginia's state constitution does not contain right-to-know or right-to-participate provisions similar to Montana's.

Additionally, some state agencies apparently respond differently to public record requests made by in-state requestors and requests from entities outside of Montana, based in part on the use of "person" and "citizen" in different sections of current law. While § 2-6-104 permits any person to inspect public records, including out-of-state persons, § 2-6-102 reserves the right to inspect and take copies of public writings to citizens. Thus, some agencies may be declining to send copies of public records to requestors outside the state.

**Alternative 1:** Replace all instances of the word "person" in the first 11 sections of the bill draft with the word "citizen."

**Alternative 2:** Go through each section where the word "person" is used and decide on a case-by-case basis whether to substitute the word "citizen" into that section.



Sept. 2, 2014

To Members of the Interim Education and Local Government Committee

Dear Sirs and Madams,

We are writing today to offer our thanks to the members of this committee and its working group who have spent much of the past year reviewing and making recommendations to Montana's very important public records laws at the request of the Legislature.

As you know, this is an area of Montana law in which Montana's news media have a very vested interest. While we were not invited to be part of the working group's discussions, we have had an opportunity to review the work and recommendations that have occurred to date and wanted to offer our thoughts and suggestions. We would welcome the opportunity to engage more in this discussion as it moves forward.

First, we want to express again our thanks for taking on this important task. The right of the people of this state to access public information is critical, and we applaud the good-faith efforts and hard work of the working group and the committee. There are many aspects of this working draft that we see as great steps forward in ensuring the public's right to know, and which we can support without hesitation. There are other aspects that give us pause, but which we believe can be addressed to our satisfaction fairly easily.

We would like to discuss those first.

1. There are several sections of the draft legislation that include definitions for what constitutes a "public agency." They are not consistent and are narrower than current law. They should be made consistent and should include legislative and judicial agencies as well to conform to current Montana Code.
2. We have a number of concerns with new Section 3. Subsection (1) accurately reflects existing law in MCA 2-6-102, including the exemption when the right to privacy "clearly exceeds the merits of public disclosure." The section contains no guidance, however, on how that standard is must be determined. Existing language in MCA 2-3-03 (3) does address that, and we would argue should be included here to be consistent. Section 3 (1) should read "Every person has a right to examine and obtain a copy of any public information of this state, except for information that is constitutionally protected from disclosure because of *an individual privacy interest, and then only if the presiding officer of the agency determines that the demands of individual privacy clearly exceed the merits of public disclosure; or as otherwise expressly prohibited by statute.*" Related to

that, we take issue with the “individual privacy” wording being included in the next Subsection (2). This subsection is dealing with the issue of “individual or public safety or security of public facilities.” (emphasis added). Including a privacy provision here is misplaced, especially since it’s already addressed and defined in the previous subsection. We would ask that the two references to “individual privacy” be removed from this subsection. Finally, while we understand that most of this language was taken from existing code, we remain very concerned about the expansive exemptions spelled out in Subsection (2). “Security features” that could prompt this exemption go far beyond what we believe is appropriate or even constitutional. As examples, this exemption could be used by a correctional facility to refuse to disclose the number of correctional officers it employs, or by a school to refuse to share with parents what security measures are in place to protect students from violence. We believe this could be addressed with the inclusion of some specific language.

3. Several provisions in the draft, including Section 3 (3), and Section 17 (3) provide exemptions to Montana’s open records law for “collections of the Montana historical society when restrictions on access have been imposed by the collection creators or donors.” Once a record is given to the state, it cannot be withheld from public inspection. The state cannot except or honor such conditions when it comes to public records or information. We respectfully ask that this language be stricken.
4. Section 10, regarding distribution lists, is taken largely from existing MCA 2-6-109, but is titled differently. MCA 2-6-109 is entitled “Prohibition on distribution or sale of mailing lists,” while the new Section 10 is entitled “Prohibition on dissemination or use of distribution lists.” While the language change appears minor, replacing “sale” with “use” changes the intent more than what we believe is intended. More importantly, this provision seems based on the misconception that there is an expectation of privacy for “personal contact information” such as email addresses or phone numbers. No expectation exists. Additionally, “any list” as defined under this section could be construed to include sign-in sheets at public meetings, where no expectation of privacy exists whatsoever. The intent of MCA 2-6-109 was to thwart efforts to use public information as the source for unsolicited mailings, but the language contained in Section 10 goes beyond that. Again, we believe some simple language changes or the addition of exemptions could address this concern.
5. Section 5 (4) would allow the Montana historical society to charge “additional fees” on top of those allowed in Section 4 “for copies of materials contained in its collection to support the educational, curatorial, and interpretive efforts for which the Montana historical society was established...” This is in direct conflict with Section 4 and with the spirit of Montana’s open-records laws. Fees MAY NOT exceed the actual costs of fulfilling the records request. Demanding additional fees for any public record,

regardless of the custodian or the purported need for such fees, is inappropriate. We would ask that this language be stricken.

With those issues in mind, we are very supportive of the overall effort of this legislation to organize Montana's laws pertaining to public records and public information into one section. The addition of a singular definition for "public information," a definition that makes it clear that it does not matter what form the information is in, is long overdue. We support this change. We are in full agreement with Section 4, which includes new language codifying the procedure agencies must follow when a request for information is received from the public. Requiring a timely reply, and prohibiting a charge for time if the request takes less than half an hour to fulfill, are both big steps forward. While it is not in this section, we would like the committee to consider adding a provision establishing penalties for any agencies that fail to meet these conditions.

The Montana Newspaper Association remains very interested in assisting the committee as it continues to look at this issue and make changes to this draft legislation. Anything the MNA or its members can do to assist, we would be happy to help.

Jim Rickman  
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John MacDonald  
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Our Mission:  
To advance and sustain the news publishing industry in Montana.